SUBJECT INDEX

TABLE OF AUTHORITIES CITED

TEXTBOOKS

IN THE

Supreme Court of the United States

October Term, 1953
No. 225

WESTERN AIR LINES, INC.,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD, ARTHUR E. SUMMERFIELD, POSTMASTER GENERAL OF THE UNITED STATES, AND THE UNITED STATES OF AMERICA, ON BEHALF OF THE POSTMASTER GENERAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals[1] [R. 341-353] is not yet reported.[2]

The opinions and orders of the Board [R. 183-253, 258-281, 333-339] which were reviewed by the Court of Appeals are not yet reported.

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[1]The United States Court of Appeals for the District of Columbia Circuit will be referred to as the "Court of Appeals," Western Air Lines, Inc., as "Western," the Civil Aeronautics Board as the "Board," and the Civil Aeronautics Act as the "Act."

[2]The opinion of the Court of Appeals is included in this brief as Appendix A.

Jurisdictional Statement.

The judgment of the Court of Appeals was entered on May 4, 1953 [R. 354]. The petition for a writ of certiorari was filed on July 31, 1953, and granted on October 12, 1953 [R. 357]. The jurisdiction of this Court is invoked under Subsection 1254(1) of Title 28, U. S. Code, and Subsection 646(f) of Title 49, U. S. Code.

Questions Presented.

The Court of Appeals construed Subsections 406(a) and (b) of the Civil Aeronautics Act (52 Stat. 998; 49 U. S. Code, Sec. 486), relating to compensation for transporting air mail, as including within the term "all other revenue," which may be applied in the nature of an offset against mail compensation, Western's nonrecurring profit derived from the sale of a capital asset consisting of a route and the related flight equipment and the profit derived by Western from the operation of restaurants, canteens and slot machines. Likewise, the Court of Appeals construed the term "shall take into consideration, among other factors," as a mandatory direction that the Board apply and offset all of the "other revenue" derived by Western against Western's costs of operation in arriving at a fair and reasonable rate of compensation under Section 406, contrasted with the Board's construction that the term vests in it discretionary power.

The questions presented are:

1. Whether, in determining a fair and reasonable rate of compensation for the transportation of mail by aircraft under Section 406 of the Act for a past period under an application pending for seven years, the Board legally can offset against the mail compensation, as "other

revenue", any part of the nonrecurring profits derived from the extraordinary and nonanticipative sale of a capital asset consisting of an air route and the related flight equipment or any part of the profits derived from the operation of gambling machines in Nevada or the operation of restaurants and canteens?

2. Whether the term "shall take into consideration, among other factors," as used in Subsection 406(b) of the Act, makes it mandatory upon the Board, in fixing a fair and reasonable mail rate, to offset all of the "other revenue" of the carrier, as held by the Court of Appeals, or whether that language vests judicial discretion in the Board, as consistently held by the Board?

Statutes Involved.

Section 406 of the Civil Aeronautics Act is set forth in Appendix B of this brief. The pertinent provisions of Section 406, and the other sections of the Act which are indirectly involved, will be set forth at the places in the argument where they are mentioned.

Statement of the Case.

In response to a petition filed by Western on April 26, 1944 [R. 15-20], the Board in 1951 fixed the fair and reasonable final rate of compensation to be paid to Western for transporting the mail during the past period from May 1, 1944, through December 31, 1948, at $3,917,361.00 [R. 338]. Both Western and the Postmaster General petitioned the Court of Appeals to review the orders of the Board. Western contended that the award was insufficient, whereas the Postmaster General contended that it was excessive. The Court of Appeals set aside the

orders of the Board in part and remanded the cases [R. 354].

The facts relevant to the area of dispute are simple. On September 15, 1947, after first obtaining the approval of the Board,[3] Western sold one of its routes and the related equipment to United Air Lines for a book profit of $1,095,102.00 [R. 196, 260, 336]. Also, during the period from May 1, 1944, through December 31, 1948, Western netted $88,000.00 from the operation of slot machines in Nevada, under a concession obtained on open bids, and from the operation of restaurants and canteens [R. 153, 161, 192, 266]. Both the $1,095,102.00 and the $88,000.00 were considered by the Board to be "other revenue" within the meaning of Subsection 406(b) of the Act [R. 261, 267], but, in order to encourage voluntary route transfers, the Board took into account only $648,-102.00[4] of the profit from the route sale in reaching the amount of mail compensation to be paid to Western [R. 262-265, 339].

The Court of Appeals agreed with the Board that the profits from the route sale and from the restaurants, canteens and slot machines were "other revenue," but ruled that the Board exceeded its authority under the Act when it excluded part of the profit from the route sale in its calculation of Wetern's final rate of mail compensation [R. 350].

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[3]*United-Western, Acquisition of Air Carrier Property.* 8 C. A. B. 298 (1947).

[4]The Board's findings are that the sale transaction included both tangible and intangible elements of value. The amount of $648,-102.00 represents what the Board found to be the profit on the tangible property sold with the route. The remainder of $447,-000.00 is the part of the total profit attributed to the intangibles sold with the route [R. 279, 339].

Specification of Errors.

The Court of Appeals erred:

1. In holding that Western's profits from the route sale and from the operation of restaurants, conteens and slot machines were "other revenue" within the meaning of Subsection 406(b) of the Act.

2. In holding that the Board exceeded its authority under Section 406 of the Civil Aeronautics Act when it decided for public policy reasons to exclude part of the profit from the route sale in calculating Western's mail pay requirements.

Summary of Argument.

Subsection 406(a) of the Act is the enabling provision which delegates to the Board the power and duty of fixing fair and reasonable rates of compensation for the transportation of mail by aircraft. Subsection 406(b) sets forth guides to aid the Board in the exercise of this power and duty.

I.

In fixing the fair and reasonable rate of mail compensation, the Board is required to take into consideration "all other revenue of the carrier," and, if it elects so to do,[5] may offset the other revenue, in whole or in part, against the carrier's operating costs, which has the end result of reducing the mail compensation to the extent of the other revenue which is applied as an offset.

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[5]The Court of Appeals held that application of the "other revenue" in the nature of an offset against the mail compensation was not a discretionary right, but mandatory, which constitutes the second question involved on this review.

The Postmaster General urged below that "all other revenue" means all other income regardless of source. The Board, with which the Court of Appeals apparently concurred, took the position that "all other revenue" does not mean all income regardless of source, but does include income of an air carrier from activities related to air carrier functions. Western consistently has urged that the term can only mean revenue derived by a carrier from transporting persons and property.

The Congress intended in Section 406 to provide for the customary pattern of fixing rates prospectively. (*Transcontinental & Western Air v. Civil Aeronautics Board,* 336 U. S. 601 (1949).) Accordingly, "all other revenue" as used in Subsection 406(b) can only embrace revenue which is subject to reasonable anticipation.

Under Subsection 404(a) (49 U. S. Code, Sec. 484) all air carriers, except the few with certificates limited to the transportation of mail alone or the transportation of property alone, are required to carry passengers and property. The revenue which an air carrier will derive from transporting passengers and property is susceptible of forecast by the Board. The profit, if any, from unusual and nonrecurring sales of capital assets, and the profits, if any, from operating gambling concessions which may be discontinued at any time voluntarily or by operation of law or from operating restaurants which may be stopped or started at the will of the carrier are not subject to forecast. The word "revenue" as used in Subsection 406(b)

cannot have one meaning for the future and another meaning for the past.

The term "all other revenue" connotes a gross amount, as distinguished from a net profit. Since the mail compensation under the Act contemplates that an air carrier's operating costs or "need" shall be met through mail compensation, it is proper that the gross income generated by those operating costs, which can consist only of revenue from carrying passengers and property, be applied in the nature of a reduction of mail compensation. Net profits from a collateral activity, even though related to air carrier functions, do not meet this measure. This postulate is sealed by the fact that the Act does not contemplate recoupment, by means of mail compensation, of losses from either related or unrelated activities.

The whole thread of the Act contemplates that the owners, whether shareholders or individuals, of an air carrier will supply and replace the capital assets, and that the Government, by means of air mail compensation, will pay (i) the cost of transporting the mail and (ii) the cost of maintaining complete air transportation service consisting of additional facilities for carrying passengers and property, which latter cost is offset by the revenue derived from that source. If the revenue from the second phase of the service is inadequate to meet the cost, it is the statutory obligation of the Government to meet it.

II.

The Congress directed the Board to "take into consideration, among other factors," the carrier's "need" for compensation sufficient to enable it (i) to transport the mail and (ii) together with "all other revenue of the air carrier" to maintain and continue the development of air transportation. In addition, the Congress directed the Board to take into consideration the condition that air carriers authorized to carry mail are required to provide necessary and adequate facilities and service for the transportation of mail, as well as the standards prescribed by law respecting the character and quality of air service. The "other factors" which the Board may consider are not named, but, of necessity, vary in importance with the facts of each case.

The Court of Appeals accepted the contention of the Postmaster General that after taking into consideration the guides enumerated, the Board was under a mandate to act affirmatively. The Board, with which Western fully and firmly concurs, took the position that after considering these guides it has the discretionary power to act affirmatively or negatively as the public interest dictates.

These guides imply that the process of fixing fair and reasonable mail rates must be left to the informed judgment and discretion of the Board. The Board is not fettered to the factors set forth in the statute, but enjoys a discretion commensurate with the broad purposes of

the Act. (*New York v. United States,* 331 U. S. 284 (1947); *Secretary of Agriculture v. Central Roig Refining Co.,* 338 U. S. 604 (1950).)

In the performance of its duties—including the duty to fix mail rates—Section 2 of the Act requires the Board to consider, among other things, the encouragement and development of an air transportation system properly adapted to the present and future needs of the nation.

The Board here sought to induce voluntary route transfers by establishing and implementing a rate-making policy under which part of the profit from voluntary transfers—assuming, over Western's denial, such profit to be "revenue"—would be excluded in fixing mail rates under Section 406. The Court of Appeals conceded the desirability of encouraging voluntary action by carriers to sell routes that could be operated by other carriers to better advantage, but failed to find in Section 406 any authority for declining to offset the profit from any such sale against the selling carrier's mail compensation under Section 406, even though the purpose be to encourage other carriers to take similar action.

Had the Congress intended to impress a mandate on the Board the discretionary term "shall take into consideration, among other factors," would not have been employed. Mandatory words of unequivical tenor were near at hand.

ARGUMENT.

I.

The "Other Revenue of an Air Carrier" Which May (Not Must) Be Applied in the Nature of an Offset Against the Fair and Reasonable Rate of Compensation for Carrying the Mail Is Limited to Revenue Derived From Carrying Passengers and Air Express.

A. The Theory of the Court of Appeals and the Board That "All Other Revenue" Means All Income From Activities Related to Air Carrier Functions and the Theory of the Postmaster General That "All Other Revenue" Means All Income, Regardless of the Source, Are Illegal and Illogical.

In fixing fair and reasonable rates of compensation for the transportation of mail by aircraft under Subsection 406(a), the Board is required under Subsection 406(b) to take into consideration, among other factors,

> ". . . the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, *together with all other revenue of the air carrier,* to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."[6]

Western holds to the view that the word "revenue", as used in Subsection 406(b), has a limited application and

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[6]Emphasis in quoted material added throughout unless otherwise noted.

includes only the gross moneys received by an air carrier for the transportation of persons and property.

At the outset of its opinion the Court of Appeals properly stated the issue raised by the italicized language of the statute in this fashion:

> ". . . Now, obviously, in this calculation the greater the amount of the carrier's existing revenues, the less the amount it needs by way of additional mail pay; and the less the revenues the greater the additional mail pay. So the inclusion of a given amount in revenues lessens the mail pay by that amount, and the omission of an amount from revenues increases the needed pay. Such is our present problem." [R. 344.]

But the Court of Appeals failed to meet the problem head-on, not once revealing its interpretation of the term "revenue." The opinion could be read as construing "revenue" to mean "income" from whatever source.[7] However, it is probable that the Court of Appeals intended to adopt the Board's theory.

The Board has conceded that the term "revenue" has limitations and does not include all income, regardless of source, but the statutory basis for the Board's interpreta-

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[7]The Court of Appeals stated:

"The Board knew, and we all know, that Western had in this period this $1,000,000, or thereabouts, in profit.

* * * * * * * * * *

"It seems to us that under this statute the Board, in fixing a rate of compensation for a past period, may view the facts as it knows the facts to be, that in determining 'need' it is not compelled to ignore that which it knows." [R. 347, 348.]

tion has never been stated.[8] It draws a blurred line as to what is or is not "revenue" under Subsection 406(b) in relation to the character of the activities giving rise to income. Thus, the Board interprets "revenue" to mean all income of an air carrier from activities related to air carrier functions,[9] reasoning in this case that the sale of a route and the operation of a slot machine concession and restaurants and canteens were activities related to air carrier functions.[10] Even if Western's interpretation of the statute were too limited, the term "revenue" still will not bear a construction which would include these special items of income.

The Postmaster General argues that "revenue" is synonymous with "income" and that all income of an air

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[8]In *Pan American Airways, Inc., Transatlantic Mail Rates,* 8 C. A. B. 267 (1947), at page 290, the Board declared:

"'All other revenue' within the meaning of section 406(b) could hardly have been intended to include revenues from every possible source . . ."

[9]In its opinion here of November 24, 1950, the Board stated: "Where the activity from which the income arose is related to the air carrier functions, such income should be considered as 'other revenue.'" [R. 193.]

[10]Many of the Board's decisions as to what is and what is not "revenue" are cited in *Pan American Airways, Inc., Transatlantic Mail Rates,* 8 C. A. B. 267 (1947), at pages 289 to 290. The Board has not considered as "other revenue" under Subsection 406(b) such items of income as net gain from the operation of pilot training schools, the manufacture and sale of pick-up devices, crop-dusting operations, military charter flights and military contracts. In the *Pan American* case the Board held that the profit realized by Pan American from the sale of stock in a foreign air transportation company was not "other revenue." On the other hand, it has included in "other revenue" such items of income as cash discounts earned and interest income from investments. (*Continental Air Lines, Mail Rates,* 8 C. A. B. 825 (1947); *Delta Air Lines, Mail Rates,* 9 C. A. B. 645 (1948).)

carrier, regardless of source, must be included in the calculation of "need" under the statute.[11]

It is obvious that the meaning of "revenue" was not resolved below. One of the three theories—Western's, the Board's or the Postmaster General's—is correct. No other construction of the statute can be conceived. And, if this Court's imprimatur be placed on the interpretation reached by the Board, the question of the proper application of that theory still remains. Otherwise, the argument would be left open that all activities of an air carrier are related to air carrier functions simply because the actor is an air carrier. This is impressively illustrated here. Western's slot machine concession rights in Las Vegas, Nevada, were held under a separate lease which was awarded following a public invitation to bid.[12] If the income Western derived from slot machines be revenue, then *any* income derived by an air carrier from *any* possible source is revenue, and the Board's theory in its application does not differ from the Postmaster General's.

This leads to an analysis of the correct meaning of the expression "all other revenue of the air carrier." If

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[11]On page 21 of the Postmaster General's Brief to the Court of Appeals, this statement is made:

> "Moreover, it is evident that the carrier's actual need can be determined only by a comparison of its actual income *from all sources,* with the amount of income determined by the Board to be sufficient to enable the carrier to perform its transportation functions properly and to receive a fair return on its investment."

[12]Exhibit WX-3, R. 161; Exhibit WX-4, R. 161; Exhibit W-12, R. 153.

"revenue" was intended by the Congress to have a restricted meaning, and the Board concedes this, the Board is restrained to the consideration of only those items of income which fall within the meaning.

B. The Word "Revenue" Has a Restricted Meaning and Was Used in a Restricted Sense in Subsection 406(b).

As stated by Mr. Justice Sutherland in *Puerto Rico v. Shell Co.*, 302 U. S. 253 (1937):

> "Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering as well, the context, the purposes of the law, and the circumstances under which the words were employed." (P. 258.)

"Revenue" is an equivocal word, the meaning of which depends upon the context in which it is used.[13] For instance revenue is used to denote public income, as from taxes. And in the case of common carriers, it most often refers to the principal classes of gross operating income which a carrier realizes.

"Revenue" is used twice in the Act. The second time is in Subsection 1002(e) (49 U. S. Code, Sec. 642), which reads in part:

> "In exercising and performing its powers and duties with respect to the determination of rates for

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[13]In *Bates v. Porter*, 74 Cal. 224, 15 Pac. 732 (1887), the Supreme Court of California stated:

> "The word 'revenue' is used in many senses. It is, like thousands of words in our language, ambiguous in meaning, the significance of which can only be determined by the words with which it is connected." (P. 240.)

the *carriage of persons or property,* the Board shall take into consideration, among other factors—

* * * * * * * *

"(5) The need of each air carrier for *revenue* sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service."

The word "revenue" in Subsection 1002(e)(5) means revenue accruing from the rates charged for the carriage of persons and property. It cannot possibly mean anything else. Subsection 406(b) requires the Board to consider the "other revenue" of the carrier. Without question the Congress intended to include within this expression the revenue referred to in Subsection 1002(e)(5).

It is noteworthy that the word "other" is used in context with "revenue" in Subsection 406(b), giving to mail compensation the same attribute of being "revenue" that income from the transportation of persons and property has under Subsection 1002(e)(5). Thus, the principal classes of gross operating income of air carriers—from the carriage of persons, property and mail—are tied to the word "revenue". No other form of income is provided for or referred to in the Act.

It also should be noted that Subsection 406(b) refers to "honest, economical, and efficient management." This test, common to most if not all rate-making statutes, requires the Board to screen the reported operating costs of each air carrier and then compare the adjusted costs of operation to what the carrier has received in the way of revenue. The obvious implication is that "revenue" is a gross figure, not the net profit after accounting for the

expenses of running slot machines or the excess of the sales price over the cost of a capital asset.

If "revenue" include amounts of net profit from collateral activities, related or unrelated to air transportation, then the Board would be remiss in failing to scrutinize the costs of activities giving rise to the special profits to determine if management acted honestly, economically and efficiently, in connection with those activities. It is certain that the Congress had no intention of burdening the Board members with being experts not only in the field of air transportation but experts as well in every extracurricular field in which an air carrier conceivably might engage, the range of which is bounded only by general corporate laws.

The reference in Subsection 406(b) to revenue "of the air carrier" is of more than passing significance. An air carrier under Subsection 1(2) of the Act (49 U. S. Code, Sec. 401) is "any citizen of the United States who undertakes . . . to engage in air transportation." Accordingly, in using the words "revenue of the air carrier" in Subsection 406(b) the Congress must have intended to mean the revenue which the air carrier would derive from being engaged in air transportation. Air transportation under Subsection 1(10) of the Act includes interstate air transportation, which in turn under Subsection 1(21) means "the carriage by aircraft of *persons* or *property* as a common carrier for compensation or hire or the carriage of *mail* by aircraft . . ." Thus, the Congress could have had in mind in Subsection 406(b) only the

revenue derived from the carriage of persons or property, as the compensation resulting from the carriage of mail is the principal subject of Section 406.

The clear design is that "other revenue" in Subsection 406(b) pertains solely to the "revenue" described in Subsection 1002(e), arising from the rates charged by air carriers for transporting persons and property. It is only such receipts that the Board legally may consider in determining "need" under the statute.[14]

Had the Congress intended "revenue" in Subsection 406(b) to have a meaning synonymous with "income" or a more expansive meaning than revenue from the carriage of persons and property, it would have used language appropriate to its intent.[15]

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[14]In *Atlantic Coast Line R. Co. v. Public Service Commission,* 77 Fed. Supp. 675 (1948), the United States District Court for the Eastern District of South Carolina stated:

> "The railroad's income *from sources other than its own railroad operations* should obviously not be taken into account in considering the confiscatory effect of the Commission's actions." (P. 683.)

[15]*E. g.,* in the Air Mail Act of 1934 (48 Stat. 933) these expressions were used: *"all forms of gross income"* (Subsec. 6(b)); *"revenues and profits from all sources"* (Subsec. 6(e)). And, in Subsection 606(5) of the Merchant Marine Act of 1936 (49 Stat. 2004), this expression was used: *"net profit . . . (without regard to capital gains and capital losses) . . ."*

In *Air Mail Compensation,* 206 I. C. C. 675 (1935), the Interstate Commerce Commission held that the expression "revenues and profits from all sources"—a much broader category than "all other revenue"— did not extend to off-line passenger and express operations, declaring:

> "Revenues from 'all sources,' if extended to off-line passenger and express operation, are broad enough to include revenues from sources entirely unrelated to air transportation. No matter how sound such ventures may appear, nor how profitable or unprofitable they may be, they cannot be regarded as within the contemplation of the Act." (P. 697.)

C. The Congress Did Not Intend in Section 406 to Depart From the Customary Pattern of Fixing Rates Prospectively, Thus Limiting the Meaning of "Revenue" to Passenger and Express Tariffs.

Even if use of the word "revenue" of itself is not deemed sufficient to invalidate the Board's action, affirmed by the Court of Appeals, the purposes of the Act clearly place a restricted meaning on the word.

The manifest intent of the Congress in Section 406 is that rates of compensation for the transportation of mail by aircraft will be fixed prospectively. This Court so held in *Transcontinental & Western Air v. Civil Aeronautics Board,* 336 U. S. 601 (1949). And the Board at all times since its creation has acted on this premise. Only where lack of expedition in a mail rate proceeding has occurred, as in this case, has the Board been confronted with fixing a "retroactive" rate. Hence, the word "revenue" could have been intended by the Congress to include only the income of an air carrier which is subject to reasonable anticipation.

Revenue derived from the transportation of persons and property is the only type of income which can be forecast by the Board with any certainty and within range of fairness, since all certificated air carriers are required to carry passengers and property in addition to mail (Subsec. 404(a) of the Act), except those carriers that have certificates limiting their operation to the transportation of mail alone or property alone.

Income which may be derived from collateral sources, such as the operation of slot machines, restaurants or canteens, cannot be predicted by the Board with any certainty or any fairness. One very simple reason for this is that no airline is required by its certificate to operate slot machines or restaurants or canteens and is at liberty, where state law permits, to commence or discontinue such activities at will. Another reason is that the Board is not expert in the field of slot machines, restaurants and canteens, as it is in the field of air transportation.

By the same token, a nonrecurring, sporadic capital gain (or loss) resulting from the sale of a vacant lot purchased at one time, out of funds made available by the shareholders, in anticipation of the construction of a ticket office or the sale of antiquated equipment or the sale of a route, cannot possibly be anticipated in advance. If Western had not had an application to fix its mail rate pending at the time it sold its Los Angeles-Denver route and the related equipment to United Air Lines, the principal point of issue dollarwise on this review would not have been an issue below. The meaning of "revenue" is not enlarged or reduced simply on the basis of the point of time at which a rate proceeding is commenced. The word "revenue," as used in Subsections 406(b) and 1002(e), has a definite meaning, whatever this Court decides it to be, and does not change its color because the Board is considering a past as opposed to a future rate period.

D. The Limitation of "Revenue" to Passenger and Express Tariffs Is Confirmed by the Fact That the Board Has Control Over Passenger and Express Rates, But No Control Over Income Derived by a Carrier From Collateral or Incidental Activities.

Another significant factor which exposes the fallacy of the interpretation below of "all other revenue" is that under the Act the Board has control over and power to prescribe the revenue of air carriers *only* with reference to the three principal sources of air carrier income—passengers, property and mail. Section 1002 gives the Board the power to determine and prescribe the rates which an air carrier may charge for transporting passengers and property. Section 406 empowers the Board to determine and fix rates of compensation for transporting the mail. The Board has no power to determine the prices an air carrier shall charge or the amount of income an air carrier shall receive in connection with incidental or collateral activities—operating restaurants or slot machine concessions. The Congress realized the significance of this and deliberately chose the word "revenue" for use in Subsections 406(b) and 1002(e).

Considering that the Board has control over the revenues derived from transporting passengers and property—the cost of which, less the resulting revenues, the Government has underwritten under the Act—and thus has the power to see to it that those revenues are productive of the maximum amount possible, the Congress wisely and rightly provided that the Board should consider those revenues in fixing a fair and reasonable rate of compensation for transporting the mail.

But under light of the fact that the shareholders who furnish the capital must bear the burden of losses from the sale of capital assets, including routes, and from incidental or collateral activities, with a corollary right to the profits, plus the fact that the Board does not have the power to determine the prices that an air carrier shall charge or receive in connection with sales of capital assets or incidental or collateral activities, the Congress, again wisely and rightly, by using the restricted word "revenue," excluded these types of income from the air carrier receipts which may (not must) be applied as an offset against mail conpensation.

E. Judicial Enlargement of the Meaning of "Revenue" Would Shift to Western's Shareholders the Burden Imposed Upon the Government by Section 406.

If this Court were to approve the interpretation placed upon the word "revenue" in Subsection 406(b) by the Court of Appeals, it would mean that Western's shareholders would be required to pay a part of the cost of the development of air transportation service which the Government is bound by statute to pay if the revenue from that service be insufficient to meet the cost.

It is common knowledge that prior to 1938 the air transportation industry was in a competitive and economic quagmire and that the Civil Aeronautics Act of 1938 was enacted by the Congress to inject competitive and financial stability into the industry by requiring certificates of public convenience and necessity and by underwriting the cost of providing complete air transportation service through mail compensation. The Federal Government thus was put to the task of developing a first-rate and

self-sufficient air transportation system not alone to provide speedy and efficient air mail service but, more important, a system which would give to this country the commercial air service required to meet the ever-increasing demands of the foreign and domestic commerce of the nation and the national defense. To accomplish these purposes, the Government was made responsible for insuring that private industry, which was to furnish the property and equipment and the necessary capital, would realize a reasonable profit on its investment, assuming an honest, economical and efficient management.

The goal was to build a system of air carriers which, in time, would be made self-sufficient by payments directly from the users of air service, including the Government. But, until the revenues from transporting passengers and property, together with revenues for carrying mail, proved sufficient to meet the cost of air service plus a reasonable return, the public, through its national treasury, was to underwrite the difference.

It is self-evident that the scheme adopted by the Congress was intended to place the *ultimate* burden of the cost of air service on the people who use it, with the *interim* burden, pending attainment of self-sufficiency by the industry, on the public at large.

The cost of transporting persons, property and mail is an ascertainable quantity. It does not include and is not affected by the cost of running a restaurant or operating slot machines, nor by the cost price of capital assets which are sold. Management's only responsibility in such incidental activities is to its shareholders—the Board having no control here—and it is only proper that the shareholders who furnished the capital, not the Govern-

ment, should benefit from the profits and bear the losses from those activities.[16]

To require that the profit from the sale of a route or any other capital asset or the profit from running a restaurant or operating slot machines be applied to take up part of the cost of air service which the Congress has committed the Government to buy, if the traveling public does not, would mean that Western's owners, its shareholders, would be bearing the Government's statutory burden.

That result would be doubly intolerable unless the public which would enjoy the benefit of such profits were required to bear any losses from the same activities, although not a necessary part of air transportation. It is inconceivable that the Congress intended to burden mail rates with losses from the incidental activities in which a carrier might engage.

The only intelligible interpretation of Subsection 406(b) is that the Congress intended "all other revenue" to be limited to the gross returns of an air carrier from transporting persons and property.

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[16]It would appear that in at least one of its fairly recent decisions the Board was not unsympathetic to this philosopy, as indicated by the following statement taken from *Pan American Airways, Inc., Transatlantic Mail Rates,* 8 C. A. B. 267 at 290 (1947):

> "'All other revenue' within the meaning of section 406(b) could hardly have been intended to include revenue from every possible source unless the Act had intended that air carriers should not be permitted, at least so long as they might receive subsidy mail pay, to engage or invest in non-air-carrier activities. Yet there is no indication in the Act that such was its intent. Clearly, in determining need we could not consider net losses sustained by a carrier in non-air-carrier activities. To do so would result in Government subsidization of such activities through mail payments without any statutory authority therefor. Yet if we were to consider the profits from such activities to reduce need, we would place the carrier in the position of standing all losses from such activities but reaping no benefits from the profits so long as it remained on a subsidy basis."

II.

The Term "Shall Take Into Consideration, Among Other Factors," as Used in Section 406 Is Not Mandatory in the Sense That the Board Must Give Controlling Significance to Any of the Rate-making Elements, as Erroneously Held by the Court of Appeals, but Vests Judicial Discretion in the Board, as Correctly Held by the Board.

A. Had the Congress Intended to Require the Board to Give Controlling Significance to Any of the Rate-making Elements Specified, Mandatory, Not Discretionary, Words Would Have Been Used.

Section 406 requires that the Board fix fair and reasonable rates of compensation for the transportation of mail by aircraft and directs that, in determining the rate in each case, the Board "take into consideration" certain enumerated rate-making elements "among other factors."

The holding of the Court of Appeals was that mail payments to air carriers under Section 406 are restricted to the "need" of individual carriers for compensation—which is only one of the rate-making elements set forth in the statute—and may not be employed for the purpose of encouraging the industry generally, including the air carrier directly affected, to follow a course of action deemed by the Board to be in the public interest but which the Board is powerless to require of air carriers [R. 349, 350].

Parenthetically, it might be noted here that the word "need" in Subsection 406(b) applies equally and alike to compensation both (i) for the transportation of mail, and (ii) together with all other revenue, for maintaining and continuing the development of air transportation. None-

theless, the Postmaster General, the Board and the Court of Appeals in unison concede (and Western agrees) that all carriers, the rich as well as the poor, are entitled as the bare minimum to a so-called compensatory mail rate, regardless of the source, extent or lack of other income. Thus, in arguing that mail compensation for carrying the mail alone is just that—compensation—but that compensation for maintaining and continuing the development of air transportation is sheer subsidy or an outright gratuity, the debaters tint the word "need" with two clashing colors. Stated another way, as applied to the transportation of mail the proponents proclaim that "need" in effect means cost plus a fair profit, but when the same word in the same sentence is applied to the maintenance and continuation of air transportation it involves something entirely different—actual economic need. One word in one sentence referring to two clauses cannot be given two entirely different meanings.

Consistently the Board has interpreted "take into consideration" to mean what simple semantics would have it mean, the discretionary right of doing what good judgment dictates in accordance with the circumstances prevailing in each situation under consideration. The Board always has thought, and rightly so, that the only mandate which it was required to meet was to *consider* the guides set out by the Congress and then act affirmatively or negatively in response to its judicial discretion.

Had the Congress intended to bind the Board as to the weight or significance to be given to the factors named in Subsection 406(b), it would have been simple to use language that could not have been misconstrued, assuming there be justification for the misconstruction placed upon

the language of the statute by the Court of Appeals and the Postmaster General.[17] Moreover, had the Congress intended that "take into consideration" would require positive action, beyond the act of considering, it is not likely that the term would be followed by the clause "among other factors," without identifying those other factors.

B. It Was the Avowed Intent of the Congress to Cloak the Board With Broad Judicial Discretion Concerning the Action to Be Taken With Respect to the Various Rate-making Elements.

The words of Subsection 406(b), set up by the Congress to guide the Board in reaching fair and reasonable rates of mail compensation, do not inhibit the Board in the responsible exercise of its broad rate-making power, provided the Board acts with fairness and in relation to the attainment of the legislative purposes.

The mandate of the statute is that the Board "take into consideration" the named factors "among other factors." This means that the Board is required to give such weight or significance to the appropirate rate-making elements as the circumstances merit. It means no more than that. The choice is left to the informed judgment of the Board, and, while the Board must consider the

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[17]In his Petition to Reconsider before the Board dated July 27, 1951 [R. 282-289], the Postmaster General stated:

> ". . . in the consideration of whether the development of air transportation requires a subsidy to a particular carrier in addition to compensation for services rendered, as directed by the same action, the Board has *no discretion* under such section but must take into account all other revenue of such carrier obtained from all sources." [R. 284.]

factors specified by the Congress, it need not act wholly or partially in response to any of them.[18]

Rate-making is the function of experts. Courts may not upset rate determinations simply because they would have appraised differently the value or weight of the factors in the rate-making process. As stated by Mr. Justice Douglas in *New York v. United States,* 331 U. S. 284 (1947), regarding Section 15(a)(2) of the Interstate Commerce Act:

> "The balancing and weighing of these interests is a delicate task . . . There may be differences of opinion concerning the weight to be given those factors . . . But their significance is for the Commission to determine; and, though we had doubts, we would usurp the administrative function of the Commission if we overruled it and substituted our own appraisal of these factors." (Pp. 347, 349.)

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[18]In *United States v. Interstate Commerce Commission,* 88 F. 2d 780 (1937), certiorari denied, 300 U. S. 684 (1937), the United States Court of Appeals for the District of Columbia construed the words "due consideration," appearing in Section 15(a)(2) of the Interstate Commerce Act, in this manner:

> "The mandate of the act . . . is that the Commission shall give 'due consideration.' To give due consideration to a particular factor *necessarily means to give such weight or significance to it as under the circumstances it seems to merit,* and this, of course, involves discretion; and, as has been said many times, *judicial discretion.*" (P. 783.)

In the early case of *Babb v. Carver, 7* Wis. 124 (1859), the Supreme Court of Wisconsin had before it a statute which required the Town Supervisors to give notice of the time and place at which they would meet to decide an application to lay out a highway. The notice which was issued was that they would meet at a certain time and place to "take into consideration" a particular application. The court held that the notice was defective stating:

> "The notice is not that they would there decide upon the petition, but would take it into consideration, or deliberate upon it. This they might do, without even deciding upon the application." (P. 126.)

In *Baltimore & Ohio Railroad Co. v. United States,* 345 U. S. 146 (1953), Mr. Justice Black had this to say:

> "This mere sample of factors that have to be considered in rate cases demonstrates the *absolute necessity for considerable flexibility in rate-making* . . . Commission power to adjust rates to meet public needs is implicit in the congressional plan for a nationally integrated railroad system." (P. 152.)

The Court of Appeals did not presume to question the significance of what the Board sought to accomplish in this case. However, it blindly failed to find any authority in the statute for providing industry incentives through mail pay. Instead, the Court found that Section 406 and the decision of this Court in *Transcontinental & Western Air v. Civil Aeronautics Board,* 336 U. S. 601 (1949), leave no room for mail compensation not connected with the particular carrier's own "need."

The Court of Appeals misread Subsection 406(b). The "need" of an air carrier for mail compensation sufficient (i) to enable it to provide mail service and (ii) to maintain and continue the development of air transportation is only one of the factors which the Board is directed to consider, "among other factors." In addition, the Board is required to give consideration to the standards prescribed respecting the character and quality of air service and the condition that air carriers authorized to carry mail must provide necessary and adequate facilities and service for the transportation of mail. Beyond these factors are the "other factors" which are not named

but which the Board may consider. This is a framework of broad discretion, not ironclad compulsion.[19]

Peculiarly applicable to the point under discussion are these statements of Mr. Justice Frankfurter in *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604 (1950):

> "By way of guiding the Secretary in formulating a fair distribution of individual allotments, *Congress directed him to exercise his discretion 'by taking into consideration' three factors*: past marketings, ability to market, and processings to which proportionate

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[19]In *United States v. Interstate Commerce Commission*, 88 F. 2d 780 (1937), certiorari denied, 300 U. S. 684 (1937), the United States Court of Appeals for the District of Columbia made these statements:

> "Putting aside all questions of relative importance of the various elements of rate making—because the controlling facts in each case necessarily vary—there can be no doubt that in prescribing reasonable rates the Commission is required to take into consideration, *among other factors*, first, the effect of the rate on the movement of traffic; second, public need of adequate low-cost service; third, the carrier's need of sufficient revenue to enable it to give such service. This, we think, is the clear mandate of the statute. *But the weight to be given to these several factors is left to the discretion of the Commission, as is also the weight to be given the other and unnamed factors which of necessity vary in substance according to the facts.*" (P. 782, first italics included.)

In *Chicago B. & Q. R. Co. v. United States*, 60 Fed. Supp. 580 (1945), the United States District Court for the Eastern District of Kentucky declared:

> "Congress has not prescribed the 'other factors' to be considered by the Commission in the exercise of its power to fix just and reasonable rates. *The determination of the issue of fact in respect to reasonableness as well as the choice of the standard upon which the determination is to be made in each particular case, is left to the informed judgment of the Commission* . . ." (P. 585.)

shares pertained. *Plainly these are not mechanical or self-defining standards. They in turn imply wide areas of judgment and therefore of discretion.* The fact that the Secretary's judgment is finally expressed arithmetically gives an illusory definiteness to the process of reaching it. *Moreover, he is under a duty merely to take 'into consideration' the particularized factors. The Secretary cannot be heedless of these factors in the sense, for instance, of refusing to hear relevant evidence bearing on them. But Congress did not think it was feasible to bind the Secretary as to the part his 'consideration' of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation."* (Pp. 611-612.)

In the case here the Board's judgment was expressed in an award of money. The Board considered Western's costs or "need," the quality and character of the service required of Western and the condition that Western was required to provide necessary and adequate facilities and service for the transportation of mail. It also considered the important public interest in voluntary route transfers. The resultant award was a composite of these elements, and not the result of considerng any one of them alone. The fact that the Board reached the amount of the award by eventually excluding from its computations part of Western's profit from the sale of a route is immaterial. This was the Board's measure of the incentive required to induce voluntary realignment of

the nation's route pattern. If the Board has the power to provide the incentive—and it has—the Board's discretion to fix the amount of the incentive cannot be gainsaid.[20]

C. The Expression "Among Other Factors" in Subsection 406(b) Authorizes the Board to Consider Factors Not Specified in the Subsection and Demonstrates the Irrefragable Intent of the Congress That the Board Should Have Broad Judicial Discretion in Fixing Air-mail Rates.

The Board rested its holding in part upon the determination that there was a public need for readjustment of the air route pattern through route transfers between air carriers, in order to correct undesirable and uneconomical route structures existing in the air transportation system of this country. Recognizing that it was without power to compel air carriers to transfer routes or to merge, the Board fixed upon a policy which would preserve at least a part of the profit incentive to voluntary route adjustments.

The Court of Appeals did not deny the existence of a public need for voluntary route transfers. What the Court of Appeals denied was the Board's statutory power

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[20]The case of *Transcontinental & Western Air v. Civil Aeronautics Board*, 336 U. S. 601 (1949), did not concern the elements which the Board must or may consider, or the part such elements must or may play, in the rate-making process. The issue in that case went to the meaning of the "make effective" clause in Subsection 406(a). This Court's construction of the statute in that regard in no way predetermines this case, as suggested by the Court of Appeals.

to encourage carriers, including Western, to transfer routes, by establishing and implementing a policy affecting mail rates.

In fixing rates, as well as in the exercise of its other powers and duties under the Act, the Board is required under Section 2 (52 Stat. 980; 49 U. S. Code, Sec. 402)[21] to consider, and within its discretion may act to bring about, among other things, the encouragement and development of an air-transportation system properly adapted to the needs of the nation, the regulation of air transportation in such a manner as to foster sound economic conditions and the promotion of adequate, econom-

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[21]Section 2 reads:

"In the exercise and performance of its powers and duties under this chapter, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

"(a) The encouragement and development of an air-transporation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

"(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

"(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

"(e) The regulation of air commerce in such manner as to best promote its development and safety; and

"(f) The encouragement and development of civil aeronautics."

ical and efficient service by air carriers at reasonable charges.

The importance of mail rates as a device to accomplish the policies set forth in Section 2 was recognized by this Court in the *Transcontinental & Western Air* case, where these statements were made:

> ". . . §406(b) authorizes the Board to fix rates for 'classes of air carrier.' It is plain that the uniform rate for the class is an important regulatory device. For §2(d) of the Act, 49 USCA §402, 10A FCA title 49 §402, looks to the sound development of an air transportation system through competition. A uniform rate forces carriers within a given class to compete in securing revenue and in reducing or controlling costs." (336 U. S. 601, at pp. 606-607.)

The authority to encourage competition through uniform mail rates, which do not necessarily reflect or correspond to the individual carrier's "need" for compensation, is not different from awarding mail pay to encourage improvement of route structures and betterment of economic conditions in the industry. The public benefit in both uses of the rate-making power is large and self-evident.

It is proper and fitting that the Board be afforded ample flexibility in its rate-making power to permit it to accomplish the broad purposes of the Act, and not alone those purposes specified in Subsection 406(b). The Court of Appeals denied the Board this flexibility.

Conclusion.

The judgment of the Court of Appeals is wrong and should be reversed and the cause remanded to the Board for further proceedings.

Los Angeles, California, November 12, 1953.

Respectfully submitted,

HUGH W. DARLING,
EDWARD S. SHATTUCK,
DONALD K. HALL,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Petitioner.

Of Counsel:

D. P. RENDA,
6060 Avion Drive,
Los Angeles 45, California,

GUTHRIE, DARLING & SHATTUCK,
523 West Sixth Street,
Los Angeles 14, California.

APPENDIX A.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 11259

Arthur E. Sommerfield, Postmaster General of the United States, and The United States of America, on behalf of the Postmaster General, Petitioners, v. Civil Aeronautics Board, Respondent.

No. 11324

Western Air Lines, Inc., Petitioner, v. Civil Aeronautics Board, Respondent.

On Petitions for Review of Orders of the Civil Aeronautics Board. Decided May 4, 1953.

Mr. Daniel M. Friedman, Special Assistant to the Attorney General, Department of Justice, *pro hac vice,* by special leave of Court, with whom *Mr. Newell A. Clapp,* Acting Assistant Attorney General, Department of Justice, was on the brief, for petitioners in No. 11259. *Mr. Charles H. Weston, Chief,* Appellate Section of the Antitrust Division, Department of Justice, and *Mr. William E. Kirk, Jr.,* Assistant United States Attorney at the time of argument, also entered appearances in behalf of the petitioners in No. 11259.

Mr. Hugh W. Darling for petitioner in No. 11324. *Mr. L. Welch Pogue* also entered an appearance in behalf of petitioner in No. 11324.

Mr. O. D. Ozment, Attorney, Civil Aeronautics Board, with whom *Mr. Emory T. Nunneley, Jr.,* General Counsel,

Civil Aeronautics Board, was on the brief, for respondent, *Mr. John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, also entered an appearance in behalf of respondent.

Before PRETTYMAN, PROCTOR and BAZELON, Circuit Judges.

PRETTYMAN, *Circuit Judge:* These cases concern orders of the Civil Aeronautics Board which fixed the compensation of Western Air Lines for the transportation of mail from May, 1944, through December, 1948. The dispute revolves about Section 406 of the Civil Aeronautics Act.[1] The proper treatment of several matters is involved.

Principally the petitions concern the treatment of the profit derived by Western from the sale to United Air Lines of a certificate for an air route and certain equipment used in connection therewith. Prior to September 15, 1947, Western owned a certificate for Route 68—between Los Angeles and Denver. After a hearing the Civil Aeronautics Board approved the sale of the route and the equipment to United Air Lines[2] for a total price of $3,750,000. Of this $722,000[3] was then computed as profit on the sale of tangibles and $447,000 as profit on the sale of intangibles. The Board decided that the transfer of the route at the amount to be paid by United was in the public interest, because the profit on the transaction would provide the necessary incentive for Western

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[1]52 Stat. 998 (1938), as amended, 49 U. S. C. A. §486.

[2]United-Western, Acquisition Air Carrier Property, 8 C. A. B. 298 (1947).

[3]Later recomputed to be $648,102.

to make a sale and the purchasing carrier could operate the property to greater advantage to the public. The Board acted upon the premise that it has no power to force a carrier against its will to transfer property to another carrier; its only power to influence such transfers is the power of inducement. It decided that a profit on a sale would be such an inducement. Hence it approved the sale.

When the Board came, in the present proceeding, to the determination of compensation to Western for the transportation of mail, a problem arose as to the treatment of this profit in the computations.

The statute, in pertinent part, provides:

> "(a) The Board is empowered and directed * * * to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft * * *.
>
> "(b) * * * In determining the rate in each case, the Board shall take into consideration, among other factors, * * * the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."[4]

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[4] *Supra*, note 1.

The statutory language which is critical in the present dispute is "the need of each such air carrier for compensation * * * sufficient * * *, together with all other revenue of the air carrier, * * * to maintain and continue the development of air transportation."[5]

Perhaps the problem is made clearer by use of a little simple arithmetic. If a carrier has $1,000,000 in revenue and $1,300,000 in expenses, obviously it needs $300,000 to break even; the "break even need." Then it needs a return on its investment and some working capital; let use say $200,000 for those needs. The statute says that the carrier should receive the amount needed not only to insure the performance of the service but also to enable it to continue the development of air transportation. Let us suppose that for the latter purpose the carrier needs another $100,000. In sum the carrier needs $600,000. Now, obviously, in this calculation the greater the amount of the carrier's existing revenues, the less the amount it needs by way of additional mail pay; and the less the revenues the greater the additional mail pay. So the inclusion of a given amount in revenues lessens the mail pay by that amount, and the omission of an amount from revenues increases the needed mail pay. Such is our present problem.

The Board at first decided that the entire profit on the sale of Route 68 was "other revenue," and it included this amount as revenue in calculating the amount of mail pay needed by Western. The effect was to reduce the mail pay by that amount. Upon reconsideration the

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[5]Of course the statute provides, in effect, for a minimum which is actual compensation for service performed. That payment is not in dispute here.

Board changed its position. It included the profit from the sale of tangibles as "other revenue" in its calculation, but it did not include the profit from the sale of intangibles. The effect was to reduce mail pay by the amount of the profit on the tangibles, but the profit on the intangibles was left out of the calculation entirely.

The Postmaster General is a party in interest by reason of the duties in respect to mail pay imposed upon him by the statute.[6] He says the Board was in error in its treatment of the profit on the intangibles. Western says the Board was in error in its treatment of the profit on the tangibles. The Postmaster General would include in revenues the entire profit on the sale of the route and the equipment. Western would exclude the entire profit from revenues in the calculation.

We turn first to the problem of the profit on the tangibles. This was a gain derived from the sale of capital assets. As such it was "income" within the meaning which that term has had ever since *Doyle v. Mitchell Bros. Co.*[7] But our problem is whether it was "revenue" within the meaning of this rate-making statute. We think the answer should be sought chiefly in the substantive meanings of the statutory provisions rather than in the semantics of the phrases.

The difficulty of the problem arises because this proceeding is to determine a rate of compensation for a past period. Ordinarily, of course, rates are fixed for the future. We think it clear that the profit from an isolated past sale of capital assets could not be included in a

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[6]Sec. 406 of the Act, 52 Stat. 998 (1938), 49 U. S. C. A. §486.
[7]247 U. S. 179, 62 L. Ed. 1054, 38 S. Ct. 467 (1918).

calculation of compensation to be paid in future years for carriage of the mail. It would not be anticipated revenue in the future period. With that proposition the Board agrees. In fixing the rate for the future it has considered as revenue only reasonably anticipated items.

Western bases its foremost argument upon the foregoing as a premise. It insists that the present proceeding is a rate-making proceeding and nothing else; that a rate-making proceeding must be, in contemplation of law, rate-making for the future—a prospective rate-making, since, it says, rate-making is inherently a prospective concept. The Board itself has several times so held. And, of course, that is a generally accepted view as to utility rates. There is great power in that argument.

But we are impressed by the practical aspects of the situation. In this instance the Board was in fact looking at a period which had passed. The actual facts as to revenues and expenses for that period were known. The actual need, or lack of it, of the carrier in that period was known. In saying that the Board was looking at a past period we are not departing from the rule in the *T. W. A.* case.[8] The period began when the petition for the rate-making was filed, *i. e.*, May, 1944; as of that date the rate-making was prospective. When the Board got around to making its findings and decision the period 1944-1948 was past. It is to the latter actually that we refer.

At this point the two different considerations embodied in this statute must be noted. The statute provides for actual compensation for the service performed in carrying

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[8]T. W. A. v. Civil Aeronautics Board, 336 U. S. 601, 93 L. Ed. 911, 69 S. Ct. 756 (1949).

the mail—a so-called service rate. This is the ordinary purpose of a utility rate. It involves reimbursement for expenses incurred in performing the service, return on the investment used in the service, and a reasonable profit on the transaction. This much is due whether the service is past or future. In the case at bar no dispute arises in respect to that phase of the matter.

But this statute adds to these ordinary features of a utility rate another consideration. It provides that the pay for carrying the mail shall be sufficient to meet the carrier's need. It describes that need as being for funds to perform the service of carrying the mail and also to maintain and develop air transportation. The problem under this provision of the statute is: How much does the carrier need? The answer depends upon (1) the gross, or total, need in dollars and (2) how much the carrier will have outside of mail pay.

In the ordinary case, where the rates are for the future, the revenue of the carrier must be anticipated. But where the pay is being computed for a past period may the Board accept as a fact that which it knows to be a fact, or must it ignore the known fact and compute the rate as though it were looking at the unknown future as of the date of the beginning of the period? The Board knew, and we all know, that Western had in this period this $1,000,000, or thereabouts, in profit. That profit was derived from the disposition of assets acquired for or created by its operations under its certificate.

Let us suppose, as was the case in the basic findings here, that Western's total non-mail revenue was about $33,000,000 and its total operating expenses were about $36,000,000. How much does it need? How much does it

need if, in addition to the $33,000,000, it also has a special profit of $1,000,000? Does it actually need $3,000,000, or does it actually need only $2,000,000?

The gist of the answer lies in the fact that we are to determine "need." We are not determining merely adequate compensation for services rendered, in the ordinary public utility sense. To be sure, the payment is cast by the statute as a rate, and the process as a rate-making. But even so the Supreme Court held in the *West Ohio Gas* case[9] that, when the period under consideration has passed, fair and reasonable rates should be ascertained from what is known and not from a *nunc pro tunc* estimate. In the case now before us the disputed basic consideration is a need, a need beyond the requirements of fair compensation for a service performed, not dependent upon the amount or the nature of the service rendered. *A fortiori,* from the *West Ohio Gas* case, the amount of need for a period which has passed must be ascertained in the light of known facts.

It seems to us that under this statute the Board, in fixing a rate of compensation for a past period, may view the facts as it knows the facts to be, that in determining "need" it is not compelled to ignore that which it knows. We conclude that in ascertaining Western's need for the period May, 1944, to December, 1948, the Board was permitted to take into consideration the fact that Western had this profit in that period from the sale of these assets.

We fully realize that our view of the statute will give rise to difficulties in respect to losses and also in respect

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[9]West Ohio Gas Co. v. Comm'n (No. 2), 294 U. S. 79, 82, 79 L. Ed. 773, 55 S. Ct. 324 (1935).

to unusual or unanticipated earnings. The rule may make too much depend, from the standpoint of the carrier, upon tactical decisions whether and when to file petitions for rate-making. But we think such possibilities cannot negative statutory terms. Moreover other difficulties arise from any other rule. And, again, it seems to us that much of the anticipated difficulty can be prevented by expedition on the part of the Board, so that what is prospective in legal theory will be prospective in actual fact. If expeditious disposition of petitions does not meet the troubles arising from the rule, it is always possible that Congress may change the statutory provision. Our part is done when we conclude what Congress meant by the provision now before us.

We turn next to the treatment of the profit on the intangibles. The Board did not find, and it does not claim now, that Western itself needs the additional amount of mail pay which is shown when the profit on the sale of the intangibles in this transaction is omitted from "other revenue" in the computation. The claim of the Board is that it can allow Western to exclude this sum from stated revenues in order to encourage other carriers (not Western) to follow a given course of action. The Board said, in its opinion in the present case, that it wished to emphasize that the "decision not to include the net profit from the sale of intangibles was reached solely because we are thus seeking to encourage improvement of the air route pattern through voluntary route transfers by other air carriers. In other words, we have decided not to offset this profit against the carrier's need because we are seeking in this way to spur the development of a self-sufficient air transport industry."

We recognize the force of the Board's description of the desirability of encouraging carriers to transfer routes and other property. But we cannot find in the statute any power conferred upon the Board to do so in fixing mail pay. We do not find any mail pay provision which is authority for the Board to provide incentives to the industry generally for the development of air transportation through the voluntary actions of carriers.

In the first place, the language of the statute sharply limits development allowances to the needs of the carrier under consideration. (1) The statute speaks of the "need" of the carrier. It does not speak of the desirability of allowances. It does not speak of purely bonus awards. (2) It speaks of "each" air carrier and compensation sufficient to enable "such air carrier" to develop. The statute is not cast in terms applicable to the general field of air transportation but to the situation in which each air carrier finds itself. (3) The statute provides that the mail pay shall be sufficient "to enable" the air carrier to maintain and continue development. This is a sharply limited expression. It does not extend to bonus awards which might be encouraging to the industry generally. Thus we think that, while the so-called "need" provision of the statute, above quoted, does provide for the payments of sums sufficient to enable the carrier under consideration to maintain and continue development of air transportation, such payments are restricted to the need of each individual carrier to maintain and continue a development program of its own.

In the second place, the Supreme Court held in the *T. W. A.* case, *supra,* that the mail pay provisions of this statute describe a rate-making authority, and the Court

said that the statutory language does not suggest that Congress intended to break with the traditions of public utility rate-making. Allowances designed as developmental incentives for the utility whose rates are being determined are quite common in public utility rate-making. But the award of bonus subsidies for the purpose of encouraging an industry generally to follow courses deemed desirable by the regulatory authority is a vast departure from rate-making. Mr. Justice Jackson made the distinction indisputably clear in his dissent in the *T. W. A.* case. He was of the opinion that in these provisions of the statute Congress intended to subsidize the carriers and to underwrite their revenues. We think that the decision in the *T. W. A.* case as to the nature of the mail pay provisions leaves no room for bonus subsidies not connected with the particular carrier's own need. So the statute does not support the theory upon which the Board desires to go in this proceeding in respect to the profit from the intangibles.

We must conclude, therefore, on this point that the Board was in error in the theory upon which it excluded from the calculation the profit from the sales of the intangibles.

The parties dispute the Board's treatment of federal income tax liabilities in its computation of the mail pay. The tax liability upon an estimated basis as of the beginning of the period was some $600,000. It developed that, due to carry-back losses and other provisions of the federal tax statutes. Western had little or no tax liability for this period. In its final orders on mail pay the Board acted upon the latter basis of fact. We think it was

correct in doing so. The preceding discussion is sufficient as a statement of our reasons.

Western also asserts that the Board erred in including as "other revenue" in the calculation of mail pay the profits derived from the operation of restaurants and slot machine concessions at its airports. We think the Board was clearly correct in this treatment. When the statute says "all other revenue" it must mean to include revenue derived from activities incidental to the operation of the airline. Whether it would also include revenue from activities unconnected with airplane operation is a question not before us and upon which we intimate no opinion.

Western asserts as reversible error the decision of the Board to fix in this proceeding the mail pay beginning in May, 1944. Western says that the consideration should have begun as of January 1, 1946. But the Board has power under the statute (Sec. 406(a)) to "make such rates effective from such date as it shall determine to be proper," and the Supreme Court held in the *T. W. A.* case that that clause empowered the Board to go back as far as the date of the filing of the petition. That is what the Board did in this case. Western filed its petition for redetermination of mail pay on May 1, 1944.

We add one further comment in regard to the expressions "offset," "deduction" and "recapture" used by the parties in describing the treatment of the profit from the sale of the assets if it be included in revenue. The phraseology would not be important if it did not embody

erroneous ideas. The need which this statute contemplates is a net figure; the extra amount which appears necessary over and above that which the carrier has. The process provided by the statute is for an affirmative ascertainment of that need. The need is not a gross figure from which offsets or deductions are made. Thus the passenger revenue etc., is not "offset" against or "deducted" from the need of the carrier. None of the earned revenue is recaptured. The bare, uncomplicated situation is that when the carrier has substantial revenues from non-mail sources the margin of its need for mail pay is less. In practical dollar effect, and perhaps in accounting entries, the treatment may be set up as a gross need with offsetting items, and so it takes on an appearance of recapture. But the legal contemplation of the statute is not that, and the use of the quoted terms leads to erroneous reasoning.

The necessity for reconsiderations, redeterminations and recalculations in the light of this opinion causes us to remand the matter to the Board. The remand is to enable the Board to determine, in the light of this opinion and pursuant to the statutory terms, the amount of compensation to be paid Western for the transportation of mail during the period here involved—May, 1944, to December, 1948.

Affirmed in part, reversed in part, and remanded.

BAZELON, *Circuit Judge*, concurring: I agree with the court's opinion and its comment that the rule we adopt in construing the statute "will give rise to difficulties in respect to losses and also in respect to unusual or unanticipated earnings"[1] but I am unable to agree that "much of the anticipated difficulty can be prevented by expedition on the part of the Board."[2] I think these difficulties or "other difficulties [which might] arise from any other rule"[3] are inherent in the statute and will persist so long as there is no express differentiation therein between compensation for mail service and need payments to subsidize the development of air transportation. This is so because the absence of such a distinction, says the Supreme Court, requires the application of traditional principles of rate making.[4] The effect of this is to make applicable to subsidy as well as compensation payments the familiar principle that "past excessive earnings belong to the [carrier] just as past losses must be borne by it."[5] Therein lies the mischief. For that principle derives its validity from the premise that rates are calculated to allow for some financial risk on the part of the public utility.[6] But since the very purpose of need or subsidy payments is to remove any vestige of risk, that principle has no place in fixing such non-rate payments.

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[1]Majority opinion, p. 8.

[2]*Ibid.*

[3]*Ibid.*

[4]Transcontinental & Western Air v. Civil Aeronautics Board, 336 U. S. 601, 605 (1949).

[5]Washington Gas Light Co. v. Baker, 88 U. S. App. D. C. 115, 125, 188 F. 2d 11, 21 (1950), *cert. denied*, 340 U. S. 952 (1951), And see my concurrence this day in Summerfield, *et al.* v. Civil Aeronautics Board, No. 11351.

[6]*Ibid.*, and cases cited in note 15 therein.

APPENDIX B.

Rates for Transportation of Mail

Board to Fix Rates

Sec. 406 [52 Stat. 998, 49 U. S. C. 486] (a) The Board is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

Rate-Making Elements

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Board, considering the conditions peculiar to transportatoin by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes

of air carriers, and different classes of service. In determining the rate in each case, the Board shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation[7] of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and (the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense).

Statement of Postmaster General and Carrier

(c) Any petition for the fixing of fair and reasonable rates of compensation under this section shall include a statement of the rate the petitioner believes to be fair and reasonable. The Postmaster General shall introduce as part of the record in all proceedings under this section a comprehensive statement of all service to be required of

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[7]So in original.

the air carrier and such other information in his possession as may be deemed by the Board to be material to the inquiry.

Weighing of Mail

(d) The Postmaster General may weigh the mail transported by aircraft and make such computations for statistical and administrative purposes as may be required in the interest of the mail service. The Postmaster General is authorized to employ such clerical and other assistance as may be required in connection with proceedings under this Act. If the Board shall determine that it is necessary or advisable, in order to carry out the provisions of this Act, to have additional and more frequent weighing of the mails, the Postmaster General, upon request of the Board, shall provide therefor in like manner, but such weighing need not be for continuous periods of more than thirty days.

Availability of Appropriations

(e) Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Air Mail Act of 1934, as amended, and the unexpended balances of all appropriations available for the transportation of mail by aircraft in Alaska, shall be available, in addition to the purposes stated in such appropriations, for the payment of compensation by the Postmaster General, as provided in this Act for the

transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the continental United States or between points in Hawaii or in Alaska or between points in the continental United States and points in Canada within one hundred and fifty miles of the international boundary line. Except as otherwise provided in section 405(k), the unexpended balances of all appropriations for the transportation of mail by aircraft pursuant to contracts entered into under the Act of March 8, 1928, as amended, shall be available, in addition to the purposes stated in such appropriations, for payment to be made by the Postmaster General, as provided by this Act, in respect of the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith, between points in the United States and points outside thereof, or between points in the continental United States and Territories or possessions of the United States, or between Territories or possessions of the United States.

Payments to Foreign Air Carriers

(f) If any case where air transportation is performed between the United States and any foreign country, both by aircraft owned or operated by one or more air carriers holding a certificate under this title and by aircraft owned or operated by one or more foreign air carriers, the Postmaster General shall not pay to or for the account of any such foreign air carrier a rate of compensation for transporting mail by aircraft between the

United States and such foreign country, which, in his opinion, will result (over such reasonable period as the Postmaster General may determine, taking account of exchange fluctuations and other factors) in such foreign air carrier receiving a higher rate of compensation for transporting such mail than such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and the United States, or receiving a higher rate of compensation for transporting such mail than a rate determined by the Postmaster General to be comparable to the rate such foreign country pays to air carriers for transporting its mail by aircraft between such foreign country and an intermediate country on the route of such air carrier between such foreign country and the United States.